



IPRT
Irish Penal Reform Trust

IPRT Position Paper 3
Mandatory Sentencing

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The Irish Penal Reform Trust (IPRT) is Ireland's leading non-governmental organisation campaigning for the rights of everyone in the penal system, with prison as a last resort. IPRT is committed to reducing imprisonment and the progressive reform of the penal system based on evidence-led policies. IPRT works to achieve its goals through research, raising awareness, building alliances and growing our organisation.

Through its work, IPRT seeks to stimulate public debate on issues relating to the use of imprisonment, including on sentencing law and practice in Ireland. This is one in a series of Position Papers, which underpin the work of the IPRT.

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Introduction

In recent years mandatory and presumptive sentencing have been proposed as a means of addressing specific categories of offending. In this Position Paper we outline the current legal framework for mandatory and presumptive sentencing in Ireland, as well as describing the advantages and disadvantages of these sentences as evidenced here and in other jurisdictions. The Paper also outlines alternatives to mandatory or presumptive sentencing which can potentially address the concerns expressed by both the advocates for and against such policy.

As a preliminary point, it is important to distinguish between mandatory sentencing proper and presumptive sentencing. Mandatory (minimum) sentencing completely removes the discretion of the judge by imposing a set sentence, without the possibility of adjusting the sentence in accordance with the circumstances of a particular case. Presumptive sentencing sets up a legal presumption that a particular sentence will apply, while also providing for certain exceptional circumstances in which this presumption may not apply. Thus, a true mandatory sentence completely confines a judge's discretion. This is not the case with presumptive sentencing, although a case will have to be made as to how the offender falls within the legislative exceptions permitted. In general the same issues of policy arise in relation to both categories of sentence and we treat them both together here.

1. Mandatory and Presumptive Sentencing in Ireland

Until relatively recently, there were few mandatory sentences in Ireland, namely, the life sentence for murder, aggravated murder and treason, and disqualification from driving for the offence of drunk driving. Significantly, the Law Reform Commission in its *Report on Sentencing*¹ recommended the abolition of all mandatory sentences to reflect the many different circumstances in which even murder can be committed and degrees of culpability that may attach to the offenders in question. More recently, though, presumptive sentences have gained political currency. A presumptive sentence of 10 years has been introduced for possession of drugs with an estimated street value of over 13,000 euro (s.15A, *Misuse of Drugs Act 1977*, as inserted by section 4 of the *Criminal Justice Act 1999*) and for possession of a firearm with intent to endanger life (s.15, *Firearms Act 1925* as inserted by s.42, *Criminal Justice Act 2006*). Presumptive sentences were also applied to five other firearms offences under the 2006 Act.² Significantly, the *Criminal Justice Act 2006* provided for mandatory rather than presumptive sentences for those who had committed a second or subsequent firearms offence contrary to the above provisions.

The *Criminal Justice Act 2007* represented a major shift towards presumptive and mandatory sentencing in this jurisdiction. Section 25 of the 2007 Act provides that if an individual commits a second or subsequent serious offence in the 7 year period following a first serious offence (and that person received 5 years or more for that offence in the past) then the presumptive sentence is three quarters of the maximum sentence provided by law or 10 years if the maximum is life imprisonment. These serious offences are described in the Explanatory Memorandum to the Bill as “linked to organised crime” but are in fact of more general application. They are set in Schedule 2 to the act and include: murder, threats to kill, causing serious harm, false imprisonment, extortion, aggravated burglary, and various explosives, drug trafficking and firearms offences. Section 33 of the Act also tightened up the provisions concerning the ten year presumptive sentence for possession of drugs worth over 13,000 euro.

The Law Reform Commission in its recent *Report on Mandatory Sentencing*³ recommended that the presumptive minimum sentencing regimes for drug and firearm offences be repealed and that presumptive minimum sentences should not be extended to other offences. Contrary to its earlier recommendation that all mandatory sentences be abolished, however, the Commission this time, by a majority, favoured retention of the mandatory life sentence for murder.⁴

2. Advantages of Mandatory Sentencing

The Law Reform Commission recognised the emotional appeal of mandatory sentences, which is often fuelled by public distrust of the judiciary.⁵ It is felt that mandatory sentencing may make sentencing more consistent, transparent, and predictable and make judges more accountable for their decisions. Many would also argue that mandatory sentences send out a strong message to offenders that certain offences are particularly heinous and will not be tolerated. Mandatory sentences, by

1 Law Reform Commission, *Report on Sentencing*, 1996.

2 These are: possession of a firearm while taking a vehicle without authority (s.57, *Criminal Justice Act 2006*; 5 years); use of a firearm to assist or aid an escape (10 years; s. 58 *Criminal Justice Act 2006*); possession of a firearm or ammunition in suspicious circumstances (5 years; s.59, *Criminal Justice Act 2006*); carrying a firearm with criminal intent (5 years; (s.60 *Criminal Justice Act 2006*); shortening the barrel of a shotgun or rifle (5 years; s.65 *Criminal Justice Act 2006*).

3 Law Reform Commission, *Report on Mandatory Sentencing*, 2013.

4 *Ibid.*, para.3.76.

5 Law Reform Commission, *supra* note 1, paras. 10.60-10.61.

increasing the certainty punishment, are therefore thought by some to have a deterrent effect.⁶ In relation to the mandatory life sentence for murder, it was also recently suggested by the Law Reform Commission that applying the same penalty regime to murder and manslaughter would blur the distinction between these two offences and fail to reflect the unique gravity of the offence of murder.

3. Disadvantages of Mandatory Sentencing

3.1 Potential for Injustice

Perhaps the strongest objection to mandatory sentencing is that it is a blunt sentencing tool, which applies the same sentence to all offenders who have committed the same crime. As a result such sentences carry with them much potential for injustice. As Zimring⁷ puts it “we lack the capacity to define into formal law the nuances of situation, intent, and social harm that condition the seriousness of particular criminal acts.” For example, in an infamous case in California a twice-convicted felon received a “third strike” sentence of 25 years to life for the theft of a slice of pizza from a group of children. Similarly, the mandatory sentencing laws were repealed in the Northern Territory in Australia after an Aboriginal boy committed suicide in a detention centre while serving 28 days for stealing pens and paint. Such cases provide a clear illustration of how lack of discretion at the sentencing stage may also lead to human rights violations.

Even in relation to serious offences, the definition of those offences in law may encompass a very broad spectrum of scenarios. In relation to the existing provisions of the Misuse of Drugs Act, for example, persons found in possession of large quantities of illegal drugs who are importing those drugs into the State on the direction of others and for small personal profit (drug “mules”) are treated similarly to persons in control of large criminal enterprises.

3.2 Ineffectiveness as Deterrent

There is also a considerable doubt as to whether mandatory sentence actually works in the sense of deterring or incapacitating offenders. Tonry⁸ notes that in the US, where mandatory sentences have been introduced by a large number of states, the crime rate has been little affected. This finding was echoed by the non-profit RAND Corporation who, using a mathematical formula, found that treatment of heavy drug users would reduce about 15 times more serious crime against people and property than mandatory minimum sentences; this was so, even though an average of only 13% of those receiving treatment kick their drug habits.⁹ In this regard, Tonry¹⁰ has noted “[a] government committed to evidence-based policy making would... repeal existing laws providing for mandatory minimum sentences.”

3.3 Undermining the Integrity of the Justice System

Another difficulty is the efforts made by judges and other legal professionals to circumvent mandatory provisions. Tonry has noted that, ironically, mandatory sentencing does not achieve consistency but, on the contrary, results in increased arbitrariness in sentencing as some judges seek to avoid

6 Law Reform Commission, *supra* note 3, paras 1.21-1.22. .

7 Zimring, “Making the Punishment Fit the Crime: A Consumer’s Guide to Sentencing Reform.” in Duff, A and Garland, D (eds) *Punishment: A Reader* OUP, 1994, p.169.

8 Tonry, M, *Sentencing Matters*, OUP, 1996, Chapter 5.

9 Greenwood, P., Model, K., Rydell, C. and Chiesa, J. “Diverting children from a life of crime: What are the costs and benefits?”, MR- 699-UCB/RC/IF, RAND Corporation, 1996..

10 Tonry, M, *Punishment and Politics*, Willan, 2004, p.17

injustice: “this is well known and common ground among public officials and scholars who specialise in sentencing.”¹¹ This has already occurred in Ireland, where the failure of Circuit Court judges to impose the ten-year presumptive sentence in respect of drug trafficking has come in for much political criticism. Another concern is that discretion may move down the system so that lawyers are forced to negotiate a lower charge in return for guilty plea to avoid a mandatory sentence. This allows lawyers to “negotiate justice” in a manner which lacks transparency. Mandatory sentences may also lead to an increased number of trials and therefore delays in the system. This has occurred in the US¹² and also in Ireland in relation to the mandatory life sentence for murder. In 2006, for example, 87.5% of those charged with murder pleaded not guilty while 50% of those charged with rape did so.¹³

3.4 Impact on Rates of Imprisonment and Cost

A final consideration must be cost. Mandatory sentencing schemes - as has transpired in the US - contribute significantly to imprisonment rates. In the US, the introduction of mandatory sentencing regimes has coincided and clearly contributed to the most dramatic period of prison expansionism in history, whereby the national prison population has grown from approximately 300,000 in the early 1970s to over 2.4 million today. The Law Reform Commission has noted that this argument is particularly relevant in Ireland where the prison system is acutely overcrowded and under-resourced. The cost of keeping more offenders in prison for longer periods of time inevitably reduces the resources available for rehabilitation or education of prisoners.¹⁴ The question must be asked whether this is the best use of resources to prevent crime. In this regard, the RAND Corporation in the US estimated that every million dollars spent on California’s three-strike laws would prevent 60 serious crimes, whereas providing parent training and assistance for families with young children at risk would prevent 160 serious crimes and giving cash incentives to encourage disadvantaged high school students to graduate would prevent 258 serious crimes.¹⁵

4. Alternatives for Consistency and Transparency in Sentencing

In addition to recommendations to repeal existing presumptive minimum sentencing regimes for drug and firearm offences, and that same not be extended to other offences, the Law Reform Commission has, in numerous reports, recommended a number of initiatives that would contribute to greater consistency and transparency in sentencing. IPRT supports the introduction of such measures.

4.1 Sentencing Guidelines and Collection of Data

The Commission has repeatedly called for the establishment of a Judicial Council that is empowered to develop and publish non-statutory sentencing guidelines reflecting the general aims of criminal sanctions and setting out the principles that should underpin sentencing, including the principle of imprisonment as a last resort and the principle of proportionality between the severity of sentence and the seriousness of an offence. Such guidelines should have regard to sentencing guidance available from decisions of the Supreme Court and Court of Criminal Appeal; aggravating and mitigating factors, as well as individual offender characteristics; and information in relevant

11 Tonry, M, 2004.

12 Tonry, M, 1996, op. cit.

13 Courts Service, *Annual Report 2006*, Part 2.

14 Law Reform Commission, *Consultation Paper on Mandatory Sentencing*, 2011, para.3.277.

15 Greenwood et al, op. cit.

databases including, in particular, the Irish Sentencing Information System (ISIS).¹⁶

4.2 Judicial Explanation of Sentences

In its 2003 *Report on Penalties in Minor Offences*,¹⁷ the Law Reform Commission recommended that a sentencing judge in the District Court should provide a written explanation of any custodial sentence, including the mitigating and aggravating factors considered. IPRT believes that there is potential for far more information to be provided at the point of sentencing to explain the particular tariff in a case. Systems for providing information at the point of sentencing could also be used to set out sentence plans for each convicted person in relation to their imprisonment and engagement with rehabilitation services.

4.3 Judicial Supervision of Sentencing

The key function of supervising sentencing is needed and should be carried out by the superior courts. There are deficits in the role of the courts in oversight at present, not just in relation to sentencing. These do need to be addressed and leadership is needed from the Chief Justice, the Presidents of the High Court, Circuit Court and District Court and the Judicial Studies Institute. There is also a need to fulfil the Government's promise to establish a Judicial Ethics Board, which would help build public confidence in the judiciary.

5. Summary and Recommendations

- Mandatory sentencing removes the opportunity for judges to use their discretion and impose sentences that are appropriate in the particular circumstances of the case. Examples from other jurisdictions have shown that such restrictions on sentencing can lead to unjust punishment and breaches of human rights standards in the administration of justice.
- Research in other jurisdictions shows that mandatory sentencing is ineffective as a deterrent, and impacts negatively on imprisonment rates. It has also proved to undermine the integrity of the criminal justice system, forcing judges, prosecutors, and defence lawyers to 'negotiate justice'.
- IPRT believes that mandatory and presumptive sentences should be removed from the statute book in Ireland. Instead, alternatives to mandatory sentencing, as proposed by the Law Reform Commission, should be introduced to address the concerns relating to the consistency, transparency and predictability of sentencing practice.

¹⁶ Law Reform Commission, *Report on Mandatory Sentencing*, 2013, para.1.127.

¹⁷ Law Reform Commission, 2003 at para. 3.17.

